BOARD OF ALIEN LABOR CERTIFICATION APPEALS
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: December 24, 1996

CASE NO: 95-INA-236

In the Matter of:

PLANE TOOLING, INC.,
Employer,

On Behalf of:

FRANK GUTFRUCHT,
Alien

Appearance: J. A. Paget, Esq.
Seattle, Washington,
for the Employer and the Alien

Before: Neusner, Holmes, and Huddleston
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

Pursuant to 20 CFR § 656.26(1991), the Employer requested review, of the denial of a labor certification application by a Certifying Officer of the United States Department of Labor.[1] The Employer submitted this application on behalf of the above-named alien under authority of § 212(a) (14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14)(1990).

Statutory authority. § 212(a)(14) of the Act, as amended, provides that an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to

[1]The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations. Unless otherwise noted, all regulations cited in this decision are in Title 20. The "Act" is the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A). The "Secretary" is the Secretary of Labor, U. S. Department of Labor. The "CO" is the Hon. James E. Bailey, Certifying Officer, U. S. Department of Labor, ETA, at Seattle, Washington. The "Alien" is Frank Gutfrucht. The "Employer" is Plane Tooling, Inc. The Appeal File referred by the CO to the Office of Administrative Law judges will be cited as "AF."

receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

Procedural background. This case arose from an application for labor certification on behalf of the Alien, Frank Gutfrucht, filed by the Employer, Plane Tooling, Inc., pursuant to § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and the regulations adopted under 20 CFR, Part 656. After the Certifying Officer at Seattle, Washington, denied that application, Employer requested review pursuant to 20 CFR § 656.26. We base our decision on the record upon which the CO denied certification and the Employer's request for review and the written argument of the parties. 20 CFR § 656.27(c).

Statement of the case. On June 14, 1993, the Employer filed an application for labor certification to enable the Alien, a Canadian national, to fill the position of president of its corporation in Bellevue, Washington. The Employer, which was established in 1989, markets, assembles, and distributes tooling and ground support equipment for various American commercial aircraft companies. Employer is the subsidiary of Hydro Geratebau/Germany, a German corporation that manufactures and markets such equipment for European commercial aircraft. The Employer has four employees, one of which is the president. AF 106. Although the Alien is the president of the Employer, he is not an owner or part owner of the corporation, all of the stock, fifty-one percent of which is owned by Josef Holzer of Germany, and the remaining forty-nine percent of which is owned by Jimmy L. Cook of the State of Washington, who founded the Employer and was its president before the Alien was hired for that position. AF 71, 74, 81, 87.

Duties of the position. The job opportunity at issue is the position of the president of the Employer corporation, who is its chief executive officer. The president is expected to handle more than forty-five accounts involving a business volume that exceeds

$1,900,000. Employer's president routinely provides expertise to major aerospace companies in a broad range of problems involving aircraft tooling and ground support equipment, and in solving unusual mechanical problems. According to its application, those duties require a combination of managerial, operational, and mechanical engineering abilities. In addition, the mechanical engineering work encompasses a broad variety of professional problems that are complex in nature. AF 107.

Job Description. The advertisement used by the Employer in recruiting for this position in compliance with the regulations specified the following as the qualifications it required of the individual it sought to fill this job, and definitively stated the work conditions, and the salary it proposed to pay :

> President sought to direct the management and operations of an international aircraft tooling and ground support equipment company. Responsible for engineering, administration, finance and accounting, marketing and sales, contract negotiations, purchasing, manufacturing and assembly, and distributing of tooling and ground support equipment for commercial aircraft. Provide engineering and design expertise on all aspects of airline maintenance and ground support equipment assembled and distributed by company, including usage, maintenance, and repair, and supervise testing of equipment. Estimate costs of manufacturing precision machined, fabricated, and formed assemblies. Hire, fire, and supervise company staff and engineering subcontractors. Supervise the company's computer network system. 40+ hours/wk, 8:00 a.m. to 5:00 p.m., $72,000/year. B.S. degree or the equivalent in educ., and exp. in mechanical engineering or mechanical engineering technology and six years exp. in aircraft maintenance tooling and ground support equipment required. Must have knowledge of mechanical engineering and aircraft overhaul engineering procedures, incldg machining, welding, forming, fabrication, heat treating, plating, inspection, and quality assurance, as well as exp. in the design and engineering of aircraft tools and fixtures, including hydraulic, pneumatic, and electronic schematics. Also must have knowledge of all aspects of airline maintenance and ground support equipment manufactured by major aerospace companies, and demonstrated ability to use European process and material specification (DIN Norms) and U.S. standards. Further, must have exp. in finance, marketing, negotiating international contracts, purchasing, and supervising other workers; must have working knowlege of Lotus 123, Paradox, Word Processing, and Page Maker; must be fluent in German and conversant in French; and must be able to travel over 25% of time. AF 85.

Notice of Findings. In the March 25, 1994, Notice of Findings, the CO declined to certify this Alien under § 212(a)

(14) of the Immigration and Nationality Act, as amended, and gave the Employer an opportunity to respond by way of a rebuttal. The CO's six page attachment stated in detail the reasons for denying the certification sought by the Employer and the Alien. AF 46-52. Pursuant to 20 CFR §§ 656.21(b)(2) and 656.21(g)(8), Employer's burden of proof required it to explain and document its reasons for failing to offer to able, willing, qualified, and available U. S. workers the same wages, terms and conditions of employment that it has offered and that are being paid to this Alien in this case. The CO found the Employer's explanation inadequate.

First, the wage rate advertised for this job opportunity was less than the amount that the CO found the Employer was now paying the Alien as its president, $81,000 per year.[2] As the actual wage was more than five percent above the prevailing wage of $74.988 a year, the Employer's burden of proof required it to explain this deviation.

Second, the Employer rejected all applicants who did not assert fluency in German and a capacity to converse in French. Unless adequately documented as arising from business necessity, the required qualifications for this job opportunity must be those normally required for the same position in the United States, and those qualifications must not include requirement for a language other than English.[3] 20 CFR § 656.21(b)(2), and see §§ 656.21(b)(2)(i)(A), (B), (C).

The CO further explained that 20 CFR § 656.21(b)(5) required Employer to document and establish (1) that the qualifications required for the job opportunity described in AF 85 represent the Employer's actual minimum requirements for the job opportunity, (2) that the Employer has not hired workers with less training or experience for jobs similar to the job opportunity, and (3) that it is not feasible for this Employer to hire a president with less training or experience than Employer's advertised its job offer required. The CO then said,

> The standard for business necessity is that the requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform [the job duties in a reasonable manner.] The

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[2] Employer's application conceded on its face that the prevailing wage was $74.988 a year, which was some four percent more than the amount it offered in the advertisement, $72,000 per year.

[3] Written assertions that are reasonably specific and indicate their sources or bases are considered to be "documentation" within the meaning of the pertinent regulations. **Gencorp,** 87-INA-659 (Jan. 13, 1988)(*en banc)*; **Greg Kare**, 89-INA-7 (Dec. 18, 1989); **Joanne and David Fields**, 91-INA-2 (Nov. 23, 1992).

> requirement cannot be merely a convenience or personal preference of the employer.

AF 47. In recruiting for any professional position, said the CO, it is the general practice of United States employers to impose the essential qualifications as their actual minimum requirement. The CO then added that employers may also have a "wish list" of qualifying preferences to apply solely as a ranking factor in order to screen the available applicants and to select the best qualified candidates for final consideration, however. AF 47. By imposing some twenty-nine distinct and explicit requirements in addition to the normal vocational criteria for this position the Employer had exceeded any recognized and reasonable standard of recruitment qualifications, the CO observed.

He then said the first consideration in this context is that an applicant who can supply the skills normally required be appointed to fill such a position. The CO then said that the absence of one or even several such skills may be remedied without precluding an otherwise well qualified candidate from performing the basic duties of the job where such specific skills could be learned or adapted with minimal training or orientation.

The second consideration, said the CO, was that United States firms in the Employer's business commonly do not require their employees to speak or to be fluent in either German or French, because English is the universal language in the European aircraft industry in Germany and France, as the international aircraft manufacturing and support business is normally conducted in English. While the Employer's need to speak in German with one of two major owners was documented, the CO explained that it failed to establish that the usual duties of the president would require direct contact with the German speaking owner on a regular basis. The CO pointed out, moreover, that the Alien does not speak French, and so did not present the qualifications that the Employer's advertisement required for this position. Based on these reasons the CO concluded that the Employer's language requirement is not a normal criterion in hiring a corporation president in the United States, and that the Employer's language requirement was a personal preference of one of the owners which the Employer had used to preclude the referral and consideration of otherwise qualified U. S. workers. It follows that the Employer's language requirement is unlawful in the context of the Act and regulations.

The third consideration in the CO's denial of certification was that the Alien had not met Employer's minimum requirement for this job when he was first hired by the Employer. The CO said that the Alien's formal education had only prepared him to work at the level of a technician. Before he was initially hired by Employer the Alien had worked (1) as a machine shop supervisor for a manufacturer of aircraft tools and dies, and (2) as

estimator and plant manager for an aircraft tooling manufacturer. Later, his qualifications as a mechanical design engineer were supplemented by job experience with the Employer, which had made him eligible for this position as Employer's president. As that qualifying training was not required for the job for which the Alien was first hired by this Employer, his application for alien employment certification could not meet the requirements for this position by stating the experience he had gained on the job while working for the Employer.

After finding that the advertisements offering this position produced applications by available U. S. workers who are able, willing and qualified to perform the job offered, the CO reviewed the responses of all twenty-four job applicants. It was clear that the candidates seriously questioned Employer's good faith effort to hire a U.S. worker for this position, as the responses contended that (1) Employer's job requirements are so unique as to be "tailored" for some applicant, and that (2) the Employer's interviewing practices were unsatisfactory.[4] AF 52. As the final consideration, the CO noted the provisions of 20 CFR § 656.21(b)(6) as a further reason for denying Employer's application for alien employment certification because Employer rejected the U.S. workers who applied for the job, and failed to document that such candidates were rejected for lawful, job-related reasons. The CO observed that both Joseph Maisano and Jimmy L. Cook were more than well qualified for the job by a combination of education, training, and work experience, and were the best qualified of all the applicants. As both Mr. Maisano and Mr. Cook were rejected for this job without a clear showing that such rejection was meritorious, the CO found the rejections were for other than lawful job related reasons under the Act and regulations, as the Employer had failed to specify the lawful job related reasons for not hiring each U.S. worker who applied under 20 CFR § 656.21(j)(1)(iv). AF 51.[5]

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[4]The state agency report on response to the advertisement indicated that Mr.Maisano withdrew after learning the job opening is the result of an alien employment certification application. It noted the status of Mr. Cook as the former CEO and a stockholder of the Employer. Mr. Hice responded that the interviewer was not qualified and that he had wasted his time sending a resume for a job already held by a preselected "foreigner," as did Mr. Froehlich. AF 54

[5]Mr. Maisano's substantial academic qualifications included baccalaureate and post graduate degrees in both engineering and management science. His post graduate work was in metallurgy and in materials engineering. In addition, he currently was pursuing a Master's degree in business administration. Mr. Maisano's work experience and expertise extended across a very broad range of management functions and technical disciplines that included but were not limited to administrative, financial, and management skills, as well as aerospace power and metals sciences and technology and the technical and theoretical methods used in manufacturing and processing. At the time of his application Mr. Maisano was a professional engineer and consultant with about twenty years of professional experience. AF 50-51.

Rebuttal and final determination. Based on all of these reasons, the CO concluded that the hiring criteria of the job, as advertised were unduly restrictive under the Act and regulations, and were inconsistent with the normal requirements for this occupation in the United States. The Employer then was given the opportunity to rebut the CO's conclusions and to document and otherwise justify these defects.[6] Any findings issues in the NOF that the Employer did not address in rebuttal are deemed admitted. After Employer's rebuttal of April 29, 1994, the CO entered a final determination on July 28, 1994, in which that rebuttal was rejected and certification was finally denied. AF 9, 10, et seq.[7] In appealing, the Employer contends that two issues were not resolved by the CO's decision and order refusing certification for this Alien. The first was whether the terms and conditions of employment offered by Employer's advertisement of the job were less favorable than those offered to the Alien. The second was the business necessity of the Employer's language qualification requiring that its president speak German fluently. AF 2.[8]

Terms and conditions of employment. The CO found that the terms and conditions of employment offered by the Employer were less favorable than those offered to the Alien. The Employer's appeal on this issue reargues the contentions first stated in its rebuttal. It claimed that the salary offered in its recruiting advertisement is "the same base salary [as was] paid to Mr. Gutfrucht as president ... from 1993 to [the] present." AF 02. The documentation on which Employer relied in this rebuttal was (1) the unsworn declaration by the corporate secretary/office manager/accountant for the period from 1991 to 1994, (2) a "certification from the "Technical Director" of Hydro Geratebau, and (3) a copy of the 1993 agreement between Hydro Geratebau and the Employer, all of which were part of the record before the CO at the time the application for labor certification was denied.

The Employer did not deny that the Alien was receiving "a salary in excess of $81,000 per year," which exceeded by $9,000

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[6]In the alternative the Employer was permitted to change its job description, to readvertise the job opportunity as amended, and to have its compliance with the regulations reviewed.

[7]On August 30, 1994, the Employer requested reconsideration of the denial which the CO finally denied on July 28, 1994. AF 9, et seq. In the denial of reconsideration Employer's attorney was advised that it was entitled to appeal to the Board of Alien Labor Certification Appeals, and on December 1, 1994, the Employer filed this appeal. AF 1, 4. Employer's rebuttal and the memorandum supporting its motion for reconsideration will be considered as its brief on appeal. See AF 5, et seq., and 20, et seq.

[8]Notwithstanding these assertions in Employer's appeal, it is self-evident that the finding of the CO explicitly addressed and resolved both issues.

the salary offered by Employer's advertisement. AF 21. By way of explanation it said that this discrepancy included components that were not disclosed in either the initial application or the recruitment advertisement. Employer argued that the amount of the salary mentioned in the public offering was "only part of the compensation package." The compensation analysis in Employer's rebuttal was not complete on its face, and did not attempt to account for the full amount of the discrepancy observed by the CO. As a result, it cannot be determined which components of the total compensation offered were intended as taxable income to the prospective employee, if any. Even if the full $9,000 difference had been explained in the Employer's rebuttal, however, the recruitment advertisement did not suggest that the Employer offered a combination of salary and benefits exceeding the $72,000 stated. As a result, the actual amount that the position offered was known only to the Alien and to the Employer, but was not known to any U.S. worker responding to the recruitment advertisement.[9]

As the CO pointed out, Employer's explanation that the tax records show that an amount greater than $72,000 per year was, in fact, being paid to the Alien was not persuasive. The reason is that (1) its assertions of fact were not comprehensive, (2) its explanations were not based on documentation of the actual amount paid to the Alien, and (3) the actual amount was not disclosed in the published offer of the job opportunity. As the Employer's appellate argument adds nothing to its rebuttal, it lacks credibility and for this reason is not persuasive. Consequently, Employer's explanation for the discrepancy between the amount it paid the Alien and the amount of compensation that it offered in its recruitment advertisement is rejected.

Foreign language requirement. The regulations provide that the qualifications for the job opportunity shall not include a requirement for a language other than English unless the employer documents that the foreign language requirement arises from business necessity. 20 CFR § 656.21(b)(2)(i); **Advanced Digital Corp.,** 90-INA-137 (May 21, 1991). In order to establish business necessity under Section 656.21(b)(2)(i), an employer must demonstrate that the job requirements (1) bear a reasonable relationship to the occupation in the context of the employer's business and (2) are essential to the reasonable performance of the job duties as described by the employer. **In re Information Industries, Inc.**, 88-INA-82 (Feb. 8, 1989) (en banc). The

[9]It is possible to exclude Mr. Cook from this comment, of course, since he had held the job that the Alien now was performing, knew how much he had paid himself, and knew the amount of the benefits to which counsel alluded in the statement of this appeal. On the other hand, even he would have no reason to assume that the stated salary was not, itself, the combination of a base salary and taxable "perks," based on the text of the job announcement, despite his experience in this job.

business necessity standard set forth in Information Industries, is applicable to a foreign language requirement. **Coker's Pedigreed Seed Co**., 88-INA-48 (Apr. 19, 1989) (en banc). The first prong of the business necessity test for a foreign language requirement is met if the employer establishes the existence of a significant foreign language speaking clientele; the second prong is met if the evidence establishes that the employee's job duties require communicating in that language. **Details Sportswear**, 90-INA-25 (Nov. 30, 1990); **Hidalgo Truck Parts, Inc.**, 89-INA-155 (Mar. 15, 1990).[10] A foreign language requirement may also be justified when the employer's business requires frequent and constant communication with foreign-speaking personnel. **Capetronic USA Manufacturing, Inc.,** 92-INA-18 (Apr. 12, 1993); **Bestech Group of America, Inc.,** 91-INA-381 (Dec. 28, 1992). See for another example **Sysco Intermountain Food Services,** 88-INA-138 (May 31, 1989)(en banc) (business necessity for knowledge of Cantonese and Mandarin dialects shown when contacts with restaurant owners and suppliers require communication in Chinese).

In the instant case, the Employers documentation included the job description supplied by the corporate secretary, who said a large percentage of the company's business is conducted in German, as expressed in the daily telephone contacts between the Alien and the parent corporation in Germany to discuss contracts, specifications, cost estimates, and marketing. This was supported by a telephone bill that included a large number of calls to Germany. AF 108, 111-115.

Conspicuously absent from the Employer's proof, however, was any evidence that Alien's behavior was historically consistent with the way the business had been run when Mr. Cook was the president. Why was it necessary for the Alien to telephone Germany with marked frequently when such consultations apparently were not necessary for Mr. Cook? Employer's rationalization and its supporting documentation are confronted by the fact that Mr. Cook performed this job successfully for a long time without being fluent in the foreign language now required by Employer. This is inferred from the circumstance that Mr. Cook started and operated the business for several years without fluency in either German or French. As his lack of facility in these two languages speaks for itself, it is inferred that the Alien's frequent calls to Germany after he was promoted to CEO signify a material change in the nature and content of the president's job after Mr. Cook resigned.

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[10]A foreign language requirement may be justified by plans for expansion of business into a foreign market. **Remington Products, Inc.**, 89-INA-173 (Jan. 9, 1991)(en banc).

A further circumstance that challenges Employer's argument is that it has not established anything inherent in the nature of the Employer's aircraft support business that requires fluency in German or in any other language than English for the reasonable performance of the job duties described by the Employer. Neither its brief nor its rebuttal demonstrated either (1) a significant foreign language speaking clientele, or (2) anything in the Alien's job duties that could not be carried on reasonably in English. To the contrary, Mr. Cook's work as the Employer's president without fluency in any foreign language persuasively demonstrated that, while the Alien's facility in a foreign language was a convenience for one of the owners, it was not a business necessity.

The Employer has not explained how such a business necessity arose when the Alien became president after Mr. Cook resigned. Specifically, the Employer has provided no job related reason for the changed business pattern pattern that now required frequent foreign language consultations in the Alien's frequent calls to Germany, which was inconsistent with the history of the company. AF 108. Moreover, there is no documentation of the need for fluency in German or French in this industry in the United States and abroad, as demonstrated in the evidence of record and in the resumes that appear in this file. Accordingly, the reasons given by the CO for finding that the Employer did not establish the business necessity of the language requirement are found to be correct, and are affirmed.

Accordingly, an order will enter affirming the denial of labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **Plane Tooling, Inc.**
(Frank Gutfrucht)

Case No. : 95-INA-236

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: December 23, 1996

This is a redraft of the original. The original vote sheet has been mislaid. Please review and approve. Thanks.